No. 83-422

In the Supreme Court of the United States

OCTOBER TERM, 1983

GROUP HEALTH INCORPORATED, PETITIONER

v.

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that petitioner, a provider of health services under the Medicare statute, 42 U.S.C. (& Supp. V) 1395 *et seq.*, was not entitled to reimbursement of certain "interest" expenses under the statute and applicable regulations.

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1a-4a), the district court (Pet. App. 5a-13a), and the Provider Reimbursement Review Board (Pet. App. 14a-23a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 9, 1983. On August 2, 1983, Justice Marshall granted an extension of time within which to file a petition for a writ of certiorari to and including September 5, 1983 (a legal holiday), and the petition was filed on September 6, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Title XVIII of the Social Security Act, 42 U.S.C. (& Supp. V) 1395 *et seq.*, establishes Medicare, a feder-

ally funded program of assistance for the medical care of the aged and disabled. Part A of the program, which is involved in this case, provides "hospital insurance" benefits (inpatient hospital care and post-hospital extended or home health care) and is financed by Social Security payroll contributions. 42 U.S.C. (& Supp. V) 1395c-1395i-2. Federal funding is available to cover costs of certain basic services that are "reasonable and necessary" for the diagnosis or treatment of illness or injury. 42 U.S.C. (Supp. V) 1395y(a)(1). The Medicare program is administered by the Health Care Financing Administration (HCFA), a part of the Department of Health and Human Services (HHS).

Providers of Part A services are generally hospitals, skilled nursing facilities, and home health agencies. Instead of reimbursing Part A Medicare beneficiaries directly, the Secretary of HHS pays the provider for the health care services it has rendered to beneficiaries. The Medicare statute provides for reimbursement only for the "reasonable cost of any services," which is defined as "the cost actually incurred, excluding therefrom any part of incurred cost found to be unnecessary in the efficient delivery of needed health services." 42 U.S.C. 1395x(v)(1)(A). See also 42 U.S.C. (Supp. V) 1395f(b). Congress has given the Secretary express statutory authority to establish the methods for determining "reasonable costs" for services. See 42 U.S.C. 1395x(v)(1)(A). See also 42 U.S.C. 1395hh. The Secretary has exercised this authority by promulgating regulations, 42 C.F.R. Pt. 405 *et seq.*, and a series of Health Insurance Manuals.

A provider receives interim payments at least monthly for its estimated reasonable costs incurred in furnishing services to Medicare beneficiaries. 42 U.S.C. (& Supp. V) 1395f, 1395g. A provider's annual cost report is audited later to determine the actual costs incurred. See 42 C.F.R. 405.454, 405.1803. Congress was aware

that under this type of reimbursement system it was likely that health care providers would receive overpayments or underpayments at various times. Therefore, it instructed the Secretary to "provide for the making of suitable retroactive corrective adjustments where, for a provider of services for any fiscal period, the aggregate reimbursement produced by the methods of determining costs proves to be either inadequate or excessive." 42 U.S.C. 1395x(v)(1)(A)(ii). The Secretary responded to this congressional directive by promulgating 42 C.F.R. 405.1885, which provides for the reopening, within a three-year period, of any reimbursement determination made by an intermediary, a hearing officer, the Provider Reimbursement Review Board (PRRB), or the Secretary herself. The statute also provides that interim payments to providers shall include "necessary adjustments on account of previously made overpayments or underpayments." 42 U.S.C. 1395g(a). See also 42 C.F.R. 405.454(f), 405.1803(b).

At the provider's option, a nongovernmental organization (frequently a private insurance company) may act as "fiscal intermediary." 42 U.S.C. (& Supp. V) 1395h. The intermediary is nominated by the provider, but it enters into agreements with the Secretary and acts on behalf of the Secretary in certain respects. See 42 C.F.R. 421.5(b). The intermediary audits the provider's cost reports and makes payments to the provider for the reasonable cost of services supplied to Medicare beneficiaries. Under the statute the intermediary may also "serve as a center for, and communicate to providers, any information or instructions furnished to it by the Secretary, and serve as a channel of communication from providers to the Secretary." 42 U.S.C. (Supp. V) 1395h(a)(2)(A). Determinations of a fiscal intermediary respecting the total amount of reimbursement payable to a provider for a given cost year are subject to admin-

istrative and judicial review. 42 U.S.C. (& Supp. V) 1395*oo*; 42 C.F.R. 405.1801 *et seq.*

2. Petitioner Group Health Incorporated (GHI) is a non-profit health services corporation. Through its Hillcrest Hospital unit, petitioner is a provider of health care services under the Medicare program. Petitioner purchased Hillcrest Hospital from a partnership of physicians in 1974 for the sum of $5,791,000; thereafter, it operated the hospital as a component of GHI. Pet. App. 6a, 15a. The New York State Insurance Department approved petitioner's use of its "subscriber funds"[1] for the purchase on the condition that petitioner would receive a certain rate of return on its investment, which was to be included in the Medicare reimbursement rate *(ibid.)*. Medicare regulations promulgated by the Secretary of HHS provide that only proprietary (*i.e.*, for-profit) providers may receive a return on equity capital as part of their Medicare reimbursement. 42 C.F.R. 405.429. In addition, the Secretary's regulations provide that interest expenses generally are not reimbursable if a transaction involves related parties. 42 C.F.R. 405.419(c)(1). However, New York State agencies and Blue Cross-Blue Shield of Greater New York, the fiscal intermediary, concluded that the purchase of Hillcrest could be considered a "loan" and that Medicare reimbursement could be obtained for "interest" paid by Hillcrest to GHI on the theory that the funds used for the purchase were "donor-restricted" and thus would come within an exception to the general prohibition on reimbursement of interest expenses between related parties (see 42 C.F.R. 405.419(b)(3)(ii) and (c)(2)). Pet. App. 15a-16a. Neither petitioner nor the intermediary or state agencies consulted HCFA to confirm this interpretation of the Medicare regulations (*id.* at 2a).

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[1] "Subscriber funds" generally constitute the difference between assets and liabilities of a corporation (Pet. App. 21a).

Petitioner subsequently included as an allowable cost an amount for "interest" on the funds used to purchase Hillcrest when it filed Medicare cost reports for Hillcrest for fiscal years 1974, 1975, and 1976. In the course of a field audit in 1977, the intermediary noted that Hillcrest in fact had not made any interest payments. The intermediary then asked the HCFA Regional Medicare Director to review the situation. Pet. App. 16a-17a. In September 1978, the Director advised that GHI could not be said to have made a "loan" of restricted funds in connection with the Hillcrest purchase, since the transaction actually appeared to be an investment. The Director noted that GHI was not entitled to a return on equity, because it was not a proprietary organization. The Director pointed out that, in order to be reimbursable, interest must be paid to a lender not related through control, ownership or personal relationship to the borrowing organization and that the absence of interest payments in this case constituted additional evidence that GHI and Hillcrest were operating for their mutual benefit and not at arms length. *Id.* at 17a-18a. Based on this advice, the intermediary disallowed the interest expenses petitioner had claimed.

Petitioner sought review by the PRRB, which upheld the disallowance (Pet. App. 14a-23a). The PRRB accepted the intermediary's contention that there was an absence of arms length dealing between GHI and Hillcrest in connection with the purported loan transaction (*id.* at 21a). The PRRB noted that "accrued interest" payments supposedly made by Hillcrest in 1979 had been preceded by cash transfers from petitioner to Hillcrest and that such payments amounted to "classic 'Peter-to-Paul-to-Peter' transactions" (*ibid.*). The PRRB also concluded (*id.* at 21a-22a) that petitioner was not entitled to reimbursement on the theory that there was a borrowing from a "restricted fund" within

the meaning of 42 C.F.R. 405.419(b)(3)(ii) (as the intermediary and the New York State agencies had theorized prior to the purchase), since subscriber funds are not restricted to use for a specific purpose.[2]

3. The district court sustained the PRRB decision upholding disallowance of petitioner's claim (Pet. App. 5a-13a). It noted (*id.* at 10a) that petitioner did not contest that GHI and Hillcrest were related entities within the meaning of 42 C.F.R. 405.419. The court also observed (Pet. App. 10a) that two courts had "ignored the seemingly absolute prohibition of transfers between related parties that are not from restricted funds" and had scrutinized particular transactions to determine whether they involved the potential evils at which 42 C.F.R. 405.419(c)(1) was directed.[3] Assuming arguendo that examination of individual fact situations was necessary, the district court concluded (Pet. App. 11a-12a) that the PRRB in fact had scrutinized thoroughly the relationship between GHI and Hillcrest and that the evidence was sufficient to support the PRRB's conclusion that Hillcrest had not accrued any reimbursable interest expense. The court noted (*id.* at 11a) that petitioner had not complied with the original conditions of approval and that the transaction might have been constructed so as to prejudice the government. The court rejected petitioner's contention that the PRRB had

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[2] Petitioner also had contended (see Pet. App. 19a) that the Board should follow *Trustees of Indiana University* v. *United States*, 618 F.2d 736 (1980), in which the Court of Claims allowed reimbursement of interest expenses in connection with a loan between a state university and its affiliated hospital. The PRRB concluded (Pet. App. 22a) that the facts of *Trustees of Indiana University* distinguished it from petitioner's case.

The PRRB decision became the final decision of the Secretary when she declined to review it on her own motion.

[3] The district court cited *South Boston General Hospital* v. *Blue Cross of Virginia*, 409 F. Supp. 1380 (W.D. Va. 1976), and *Trustees of Indiana University* v. *United States*, *supra*.

taken a dogmatic approach to the regulatory language (*id.* at 11a-12a).

The district court also rejected petitioner's claim that the PRRB was estopped from denying reimbursement on the basis of the intermediary's initial determination that the "interest" expenses in connection with the Hillcrest transaction would be reimbursable (Pet. App. 12a-13a). The court concluded (*ibid.*) that estoppel in such a situation would undermine the statutory scheme of interim payments to providers subject to later readjustment by the Secretary. The court also noted that it would be "illogical to bind the Board to determinations made in anticipation of the transaction when subsequent events indicated that the premises for those determinations were unfounded" (*id.* at 13a).

4. The court of appeals affirmed in an unpublished order (Pet. App. 1a-4a). A unanimous panel held that the "interest" expense claimed by petitioner was not reimbursable "because, since it was made by GHI to its own Hillcrest Hospital division, it cannot be characterized as a 'loan' under applicable regulations" (*id.* at 1a-2a). The court concluded that even if the Hillcrest transaction could be characterized as a loan (which the court viewed as "questionable" (*id.* at 3a)), it clearly was not a loan from "donor-restricted" funds within the meaning of 42 C.F.R. 405.419, since the funds at issue were not limited to a particular use. In the court's view, "[c]ommon sense as well as the statutory scheme suggests that GHI's position is untenable," since it would transform transactions that are in fact investments into "'loans' leaving the federal government to guarantee nonprofit health providers a reasonable rate of return" on their investment (Pet. App. 3a-4a).

The court of appeals also rejected petitioner's estoppel claim, noting that the intermediary had no statutory authority to bind the Secretary or to prevent the government from insisting on compliance with a valid regu-

lation (Pet. App. 4a, citing *Schweiker* v. *Hansen*, 450 U.S. 785, 790 (1981)). The court observed in this connection that, "given the strained approach relied on to conclude that these were donor-restricted funds, it is inconceivable that GHI did not think to consult the Secretary" (Pet. App. 4a).

ARGUMENT

The court of appeals' holding is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. Petitioner first contends (Pet. 13-18) that 42 C.F.R. 405.419—the regulation relied on by the PRRB and the courts below in upholding the disallowance of petitioner's claim—is unconstitutional.[4] Petitioner calls

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[4] 42 C.F.R. 405.419(a) states the principle that "[n]ecessary and proper interest on both current and capital indebtedness is an allowable cost." 42 C.F.R. 405.419(b)(2)(i) defines "necessary" interest as interest "incurred on a loan made to satisfy a financial need of the provider" and states that loans that result in excess funds or investments are not considered necessary. 42 C.F.R. 405.419(b)(3)(i) and (ii) define "proper" interest as interest "incurred at a rate not in excess of what a prudent borrower would have had to pay in the money market existing at the time the loan was made" and paid by a lender "not related through control or ownership, or personal relationship to the borrowing organization." However, interest is allowable if paid on loans from the provider's "donor-restricted funds, the funded depreciation account, or provider's qualified pension fund."

42 C.F.R. 405.419(c)(1) generally provides that interest is not a reimbursable expense if a transaction involves a lender "related through control, ownership, or personal relationship to the borrower." That subsection explains:

> The intent of this provision is to assure that loans are legitimate and needed, and that the interest rate is reasonable. Thus, interest paid by the provider to partners, stockholders, or related organizations of the provider would not be allowable. Where the owner uses his own funds in a business, it is reasonable to treat the funds as invested funds or capital, rather than borrowed funds.

attention to the fact that Section 405.419(c)(1), which provides generally that interest is not a reimbursable expense under Medicare if it is paid to a lender related to the borrower, is subject to an exception under Section 405.419(c)(2), which permits, inter alia, reimbursement of interest on loans made by a religious order to a provider operated by members of the order. According to petitioner, the Secretary's denial to it of reimbursement that would be available to a provider operated by a religious order violates the First Amendment and the Fifth Amendment. Petitioner points out that the Seventh Circuit in *Northwest Hospital, Inc.* v. *Hospital Service Corp.*, 687 F.2d 985, 992 (1982), and the Court of Claims in *Trustees of Indiana University* v. *United States*, 618 F.2d 736, 740 (1980), have questioned the constitutionality of 42 C.F.R. 405.419(c) on the basis that it affords favored treatment to religious entities. Petitioner urges (Pet. 16) that the decision in this case implicitly conflicts with the decisions of the Seventh Circuit and the Court of Claims.

Petitioner's suggestion of a conflict on the constitutional issue is incorrect. Neither the Seventh Circuit nor the Court of Claims found it necessary to decide the constitutional question. In this case, too, it was unnecessary for the court of appeals to reach that question, because it concluded at the outset (Pet. App. 1a-2a, 3a) that the Hillcrest transaction appeared not to involve a "loan" from GHI to Hillcrest. Thus, petitioner could not have obtained reimbursement for the "interest" expenses, even in the absence of the related parties provi-

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42 C.F.R. 405.419(c)(2) states that "[w]here the general fund of a provider 'borrows' from a donor-restricted fund and pays interest to the restricted fund, this interest expense is an allowable cost"; and also that "if a provider operated by members of a religious order borrows from that order, interest paid to the order is an allowable cost."

sion of Section 405.419(c)(1), so the court did not need to consider whether an exception to the related parties provision impermissibly favors providers operated by religious orders in the case of legitimate loans.[5]

Assuming arguendo that the religious order exception were found to violate the First Amendment or the Fifth Amendment because it favors providers operated by religious orders over secular providers,[6] such a con-

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[5] It seems clear that petitioner lacks standing to raise the constitutional issue. This Court recently noted in *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) (citations omitted; footnote omitted):

> [A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant" and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision."

Since petitioner was unable to show that the transaction in question was a genuine loan, it could not have been injured by its inability to show that it fell within an exception to the general restriction on reimbursement for expenses of loans between affiliated parties. Thus, assuming arguendo that the religious order exception violates the Constitution, petitioner cannot identify any personal injury it has suffered "as a consequence" of that violation. See *Valley Forge Christian College*, 454 U.S. at 485 (emphasis omitted).

[6] It is not at all clear that the exception for providers operated by religious orders would be held to violate any constitutional prohibition. This Court has held that "an indirect and incidental effect beneficial to religious institutions has never been thought a sufficient defect to warrant the invalidation of a state law." *Committee for Public Education* v. *Nyquist*, 413 U.S. 756, 775 (1973). Similarly, an incidental benefit to religious orders that consists of "neutral, nonideological aid, assisting only the secular functions" of religious institutions (*ibid.*), such as rendering health care, should not be sufficient to invalidate a federal regulation. In addition, it is settled that in the area of economics and social welfare courts will not void a classification

clusion would not aid petitioner in any event. The proper remedy in such a case would be to eliminate the exception for religious providers. The alternative—striking down the broad prophylactic rule against reimbursement of interest payments between related parties—would be inappropriate, since the rule clearly serves a reasonable purpose.[7] A court presumably would choose to preserve the related parties rule without the religious provider exception, since that alternative would produce a result that is more consistent with the overall regulatory scheme. See generally *Welsh* v. *United States*, 398 U.S. 333, 361-367 (1970) (Harlan, J., concurring); *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U.S. 535, 543 (1942); *Iowa-Des Moines National Bank* v. *Bennett*, 284 U.S. 239, 247 (1931). The unlikelihood that petitioner would obtain the relief it seeks even if it were to prevail on its constitutional argument simply reinforces the conclusion that review on this issue is unwarranted.

2. Petitioner also contends (Pet. 25-26 & n.*) that the court of appeals' decision implicitly conflicts with the actual holding of the Seventh Circuit in *Northwest Hospital*, and perhaps the holding of the Court of

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because it "'is not made with mathematical nicety or because in practice it results in some inequality.'" *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970) (quoting *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911)). Accord, *Weinberger* v. *Salfi*, 422 U.S. 749, 769-770 (1975).

[7] The related parties rule is based on the proposition that factors such as "control, ownership, or personal relationship to the borrower * * * could affect the 'bargaining' process [that] usually accompanies the making of a loan, and could thus be suggestive of an agreement on higher rates of interest or of unnecessary loans." 42 C.F.R. 405.419(c)(1). The regulation avoids the need for item-by-item adjudication, thus furthering "the legitimate goals of avoiding payment of collusive or improperly increased costs with a minimum of administrative burden." *Shaker Medical Center Hospital* v. *Secretary of Health and Human Services*, 686 F.2d 1203, 1209 (6th Cir. 1982).

Claims in *Trustees of Indiana University*. That contention is incorrect. In *Northwest Hospital*, the Seventh Circuit declined to construe 42 C.F.R. 405.419(b)(3)(ii) and (c) as a blanket exclusion of reimbursement for interest on loans by related parties, reasoning that to do so in the circumstances of that case would be contrary to the purpose of the Medicare statute and regulations allowing reimbursement for "necessary" and "proper" interest. 687 F.2d at 995-996. In *Trustees of Indiana University*, the Court of Claims found an implied exception to the regulation for a loan between a non-profit university hospital and its affiliated university on the ground that such a loan did not involve the evils at which the Secretary's regulation was directed, *i.e.*, government payment of the cost of collusive loans with inflated interest rates. 618 F.2d at 739. The court stressed the limited nature of its holding, noting that it was not casting doubt on the Secretary's authority to adopt the prophylactic regulation generally barring reimbursement of interest payments to related persons. *Id.* at 740.[8]

This case does not conflict with these holdings, since the courts below did not interpret 42 C.F.R. 405.419 as creating a blanket prohibition of reimbursement for interest expenses arising from loans between affiliated parties; rather, the courts examined all the circumstances of the Hillcrest transaction in applying the reg-

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[8] The Court of Claims has expressly limited the holding in *Trustees of Indiana University* to its facts. In *Jackson Park Hospital Foundation* v. *United States*, 659 F.2d 132 (Ct. Cl. 1981), the court upheld 42 C.F.R. 405.419(c), noting that the exception it had made in *Trustees of Indiana University* was based on the particular facts that the provider was a non-profit hospital affiliated with a state university, received no money from the state, was prohibited by law from borrowing outside, and received its loan from the university at a below-market rate of interest (659 F.2d at 137-138). The court stated that when such facts do not exist, "the across-the-board scope of § 405.419(c) is reasonable and acceptable" (659 F.2d at 139).

ulation. Thus, to the extent some inconsistency of interpretation among the lower courts may exist,[9] this case does not present an appropriate vehicle for its resolution. Moreover, as noted in the preceding section, the prophylactic regulation clearly is reasonably related to the purposes of the Medicare statute and is therefore valid. See *Batterton* v. *Francis*, 432 U.S. 416, 428-429 (1977); *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 369 (1973).

3. Petitioner further contends (Pet. 18-19) that the government should be estopped from denying reimbursement because the intermediary earlier advised that reimbursement would be available. The courts below correctly rejected this contention, noting that under the Medicare statutory scheme power is reserved to the Secretary to adjust the amount of reimbursement. 42 U.S.C. 1395x(v)(1)(A); 42 C.F.R. 405.1885.

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[9] Several courts have held that 42 C.F.R. 405.419(b)(3)(ii) and (c)(1) are a valid exercise of the Secretary's authority to promulgate regulations. See, *e.g.*, *Shaker Medical Center Hospital* v. *Secretary of Health and Human Services*, 686 F.2d at 1209-1210; *Goleta Valley Community Hospital* v. *Schweiker*, 647 F.2d 894, 897 (9th Cir. 1981); *Stevens Park Osteopathic Hospital, Inc.* v. *United States*, 633 F.2d 1373, 1382-1384 (Ct. Cl. 1980); *Hillside Community Hospital of Ukiah* v. *Mathews*, 423 F. Supp. 1168 (N.D. Cal. 1976). Contra *South Boston General Hospital* v. *Blue Cross of Virginia*, 409 F. Supp. 1380 (W.D. Va. 1976). In addition, the courts have consistently upheld and applied 42 C.F.R. 405.427, a prophylactic regulation limiting reimbursement for non-interest costs incurred between related organizations. See, *e.g.*, *Goleta Valley Community Hospital* v. *Schweiker*, 647 F.2d at 897; *American Hospital Management Corp.* v. *Harris*, 638 F.2d 1208, 1212-1213 (9th Cir. 1981); *Stevens Park Osteopathic Hospital, Inc.* v. *United States*, 633 F.2d at 1379-1380; *Marina Mercy Hospital* v. *Harris*, 633 F.2d 1301, 1304 (9th Cir. 1980); *Medical Center of Independence* v. *Harris*, 628 F.2d 1113, 1119-1120 (8th Cir. 1980); *Pasadena Hospital Ass'n* v. *United States*, 618 F.2d 728, 733 (Ct. Cl. 1980).

Moreover, under this Court's teachings in *Schweiker* v. *Hansen*, *supra*, actions by the intermediary could not estop the Secretary from "insisting upon compliance with valid regulations." 450 U.S. at 788.[10] As the district court observed (Pet. App. 12a-13a), "[t]here is no justification * * * for preventing the government from withholding payments mistakenly authorized, especially when recoupment is built into the statutory scheme."

Petitioner relies on *Community Health Services of Crawford County, Inc.* v. *Califano*, 698 F.2d 615 (1983), cert. granted, No. 83-56 (Oct. 3, 1983), in which a divided panel of the Third Circuit held (wrongly, we believe) that the Secretary was estopped from recovering overpayments made to a Medicare provider. The court concluded that there had been "affirmative misconduct" in the form of a fiscal intermediary's allegedly "illegal" policy decision that was outside its authority.

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[10] Petitioner erroneously contends (Pet. 20) that the Court's statements in *Schweiker* v. *Hansen* are limited to situations in which a claimant receives erroneous oral advice concerning Social Security claims and do not apply when authorized representatives of the Secretary have entered into a written agreement upon which the plaintiff has relied to its detriment. *Hansen* plainly holds, without limitation to the facts of that case, that at least in the absence of serious "affirmative misconduct" an employee or other representative of the Secretary cannot bind the government to make expenditures from the public treasury that are not authorized by statute. In any event, there was no written agreement between the Secretary and petitioner respecting reimbursement of interest expenses, and petitioner, as a health care provider familiar with the statutory scheme, must have been well aware that the intermediary's reimbursement determinations are subject to review and adjustment by the Secretary. Indeed, as the court of appeals noted (Pet. App. 4a), in view of petitioner's strained efforts to construe the Hillcrest transaction as a "loan" subject to the exception for "donor-restricted" funds, "it is inconceivable that GHI did not think to consult the Secretary."

698 F.2d at 623-624, 628. We sought certiorari in *Community Health Services* because the decision in that case cannot be reconciled with the unbroken line of this Court's decisions establishing that the government may not be estopped, at least in the absence of serious affirmative misconduct. See, *e.g.*, *INS* v. *Miranda*, No. 82-29 (Nov. 8, 1982); *Schweiker* v. *Hansen*, *supra*; *INS* v. *Hibi*, 414 U.S. 5, 8 (1973); *Montana* v. *Kennedy*, 366 U.S. 308, 314-315 (1961); *FCIC* v. *Merrill*, 322 U.S. 380 (1947). In particular, the decision in *Community Health Services* conflicts with this Court's repeated instruction to the lower courts "'to observe the conditions defined by Congress for charging the public treasury.'" *Schweiker* v. *Hansen*, 450 U.S. at 788 (quoting *FCIC* v. *Merrill*, 332 U.S at 385).

In contrast, the decision in this case is consistent with this Court's decisions declining to estop the government. In addition, unlike the court of appeals in *Community Health Services*, the courts below made no finding of "affirmative misconduct" by the intermediary. This case, like *Community Health Services*, involves erroneous advice by an intermediary to a provider. However, here the PRRB and the district court both noted that petitioner did not act in accordance with the assumptions on which the advice was based, *i.e.*, that interest payments would represent a return on the subscriber funds used to purchase Hillcrest. Pet. App. 11a, 21a. The district court observed that the "manner in which the 'loan' was liquidated indicated that GHI was not complying with the original Blue Cross and Insurance Department conditions of approval and that the transaction might have been constructed so as to prejudice the government by having it reimburse expenses not contemplated by the Medicare statute" (*id.* at 11a). The court also noted that one witness before the PRRB had testified that no one involved in the pre-purchase negotiations considered the Hillcrest

transaction to be a loan (*ibid.*). Given the factual setting of this case, it seems quite unlikely that any other court of appeals, including the Third Circuit, would conclude that estoppel is warranted. Thus, there is no conflict that requires resolution by this Court, and it would be appropriate for the Court to deny review for that reason. However, the Court may wish to defer disposition of the petition pending its decision in *Community Health Services*.

CONCLUSION

The petition for a writ of certiorari should be denied. Alternatively, the Court may wish to hold the petition pending a decision in *Heckler* v. *Community Health Services of Crawford County, Inc.*, No. 83-56.

Respectfully submitted.

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NOVEMBER 1983